# INDEX



## CITATIONS

# In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 977

S. J. GROVES & SONS COMPANY, PETITIONER

*v.*

LINDSAY C. WARREN, COMPTROLLER GENERAL OF THE UNITED STATES

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA*

## BRIEF FOR RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia (R. 55–58) is not yet officially reported. The District Court of the United States for the District of Columbia filed only a memorandum for the Clerk (R. 52).

### JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered April 19, 1943 (R. 59). The petition for a writ of certiorari was filed April 29, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTION PRESENTED

Whether the Comptroller General of the United States is subject to a mandatory injunction compelling him to authorize payment of a claim for additional compensation under a contract with the United States, where a department head generally authorized by the contract to settle all disputes arising thereunder has approved the claim and submitted it to the Comptroller General for payment, but the latter has declined to authorize its payment on the grounds that the claim in question is invalidated by express specific stipulations in the contract, and that as to a substantial part of the claim the department head's decision is without any supporting finding.

## STATUTE INVOLVED

The only statute bearing on the case is the Budget and Accounting Act of 1921, the relevant portions of which are set forth in Appendix A, *infra,* p. 27.

## STATEMENT

This case arose when petitioner's claim for additional compensation under a Government contract for the construction of a dam was allowed by the Secretary of the Interior in the amount of $23,615.70 and certified by him to respondent, the Comptroller General of the United States, for direct settlement. Respondent found generally that the Secretary had overlooked certain clauses in the contract which defeated petitioner's right

to any compensation beyond the contract price, and that as to about 50% of the claim the Secretary's decision was without any supporting finding. Respondent accordingly advised petitioner that no balance was due. Petitioner then sought a mandatory injunction in the United States District Court for the District of Columbia, restraining respondent from interfering with payment of the sum allowed by the Secretary and ordering him to certify the claim for payment.

The contract in question, entered into on October 5, 1936, between petitioner and the United States, acting through the Bureau of Reclamation, Department of the Interior, called for the construction of the Grassy Lake Dam, on the Upper Snake River, Idaho, at stated unit prices (R. 1, 12–13). The contract included the following general provisions:

> ARTICLE 4. Changed conditions. Should the contractor encounter, or the Government discover, during the progress of the work subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The con-

tracting officer shall thereupon promptly investigate the conditions, and if he finds that they do so materially differ the contract shall, with the written approval of the head of the department or his duly authorized representative, be modified to provide for any increase or decrease of cost and (or) difference in time resulting from such conditions. [R. 14–15.]

ARTICLE 15. Disputes. All labor issues arising under this contract which cannot be satisfactorily adjusted by the contracting officer shall be submitted to the Board of Labor Review. Except as otherwise specifically provided in this contract, all other disputes concerning questions arising under this contract shall be decided by the contracting officer, subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto. In the meanwhile the contractor shall diligently proceed with the work. [R. 2.]

In 1934–1935, prior to the award of the contract, an exploration of the dam site had been conducted under the direction of an assistant geologist in the Interior Department, and eighteen test pits were dug in an area known as "borrow pit No. 1" situated about half a mile from the dam site (R. 15, 16, 28, 48). The geologist reported his belief that the explorations had disclosed suitable material for the necessary earth-

fill for the dam in "borrow pit No. 1" (R. 15, 28). At the time when prospective bidders were examining the site, the Government engineers advised petitioner of their expectation that "borrow pit No. 1" would yield "substantially all the required borrow material" (R. 15).

The location, depths, and logs of the test pits dug in "borrow pit No. 1" were shown in Drawing 42–D–44, which was attached to the contract specifications (R. 16, 28–29). Paragraph 27 of these specifications stated (R. 48):

> 27. Records of test pits and borings. The drawings included in these specifications show the available records of test pits dug and borings made at or near the dam site. The Government does not guarantee any interpretation of these records or the correctness of any information shown on the drawings relative to geological conditions. Bidders and the contractor must assume all responsibility for deductions and conclusions as to the nature of the rock and other materials to be excavated, the difficulties of making and maintaining the required excavations and of doing other work affected by the geology of the site of the work, and for the final preparation of the foundations for the dam and other structures.

Two other paragraphs of the specifications, 37 and 47, dealt specifically with borrow pits. Paragraph 37 declared:

37. Clearing. The area to be occupied by the dam and the surface of all borrow pits, structure sites, and quarries shall be cleared of all trees, stumps, roots, brush, and rubbish, and the cleared materials shall be burned or otherwise disposed of in a manner satisfactory to the contracting officer. Piling and burning shall be done in accordance with the provisions of paragraph 34. The cost of clearing shall be included in the unit prices bid for the other work in the schedule and no additional allowance will be made to the contractor on account of any amount of such clearing which may be required. [R. 42.]

And Paragraph 47, provided among other things, the following:

47. Borrow pits. All materials required for the construction of the dam embankment and for backfill, which are not available from required excavations, shall be taken from borrow pits as directed by the contracting officer. The location and extent of all borrow pits shall be as directed by the contracting officer, and the Government reserves the right to change the location of such borrow pits or to locate additional borrow pits as required, but such pits will be located as close as feasible to the work in which the borrowed materials are to be used. The limit of the average free haul for materials excavated from borrow pits for the earth-fill portions of the embankment will be 3000 feet, and for

the rock-fill and riprap portions will be 2000 feet. Actual required average haul of earth-fill material in excess of 3000 feet, and of rock-fill and riprap material in excess of 2000 feet will be paid for at $0.002 per cubic yard per 100-foot station. * * * Borrow pit areas shall be cleared as provided in paragraph 37. * * * If materials unsuitable for embankment or backfill purposes are found in borrow pits, such materials shall be left in place or excavated and wasted, as directed by the contracting officer, and payment for excavation and disposal of unsuitable materials excavated and wasted by direction of the contracting officer will be made at the unit price per cubic yard bid in the schedule for "Excavation, stripping borrow pits." Payment for excavation in borrow pits and transportation to embankment will be made at the unit prices per cubic yard bid therefor in the schedule, which unit prices shall include the entire cost of the excavation of the materials and of the transportation of the materials to the dam embankment: *Provided,* That all materials from borrow pits actually placed in the embankment or in backfill will again be included for payment under appropriate items of embankment construction or backfill. Measurement, for payment, of excavation in borrow pits will be made in excavation only and to the neat lines of excavations made

530126—43——2

> by direction of the contracting officer. [R. 39–41.] [1]

In addition, paragraph 33 of the specifications provided in part:

> No payment will be made to the contractor by the Government for any work done in constructing, improving, repairing, or maintaining any road, highway, or structure thereon for use in the performance of the work under these specifications. [R. 44.]

In the course of its work, petitioner opened a borrow pit in the location known as "borrow pit No. 1," but encountered large quantities of rhyolite, a hard volcanic substance, when it dug below the depths of the previous Government borings in the area (R. 2–3, 16). While the test borings had not been deep enough to reveal the presence of rhyolite in "borrow pit No. 1," that substance had been found in the test pits dug at the dam site, about half a mile away, and this had been shown on Drawing No. 4, the log of the test pits at the dam foundation (R. 27). The discovery of rhyolite in "borrow pit No. 1" was brought to the attention of the Government engineer in charge of the construction, who sent samples of the material to the Bureau of Reclamation office in Denver, which, after tests, reported that it was unsuitable for use in the dam (R. 3).

[1] This specification is set out in full in Appendix B, *infra*. The other specifications referred to in the statement are quoted in the text to the full extent shown by the record.

As a result, in order to obtain the remainder of the required embankment material, petitioner was forced to open three additional and more distant borrow pits, as located by the Government contracting officer, in two of which rhyolite was also found (R. 3–4, 16, 33). All work under the contract was satisfactorily completed on October 14, 1939 (R. 13).

The Government construction engineer refused to allow petitioner any increased costs for its borrow pit difficulties (R. 4), and on February 19, 1940, petitioner filed a claim with the contracting officer for additional compensation of $98,057.70 (R. 4, 23, 32–33). Of the total claimed, the sum of $23,615.70 was for extra costs incurred in locating the various borrow pits—clearing and draining them, and constructing haul roads thereto—on the ground that the unexpected discovery of rhyolite in "borrow pit No. 1" established a changed condition within the meaning of Article 4 of the contract (R. 31, 32, 33–34).[2]

[2] This claim for $23,615.70 was comprised of the following items (R. 31):

| | |
|---|---|
| Clearing and grubbing of areas not originally designated as borrow pits | $5,881.00 |
| Expense of providing drainage for borrow pits | 2,731.05 |
| Expenses in constructing haul roads to additional borrow pits | 3,435.65 |
| Extra costs incurred due to general borrow pit conditions | 11,568.00 |
| | $23,615.70 |

The last listed general item of $11,568.00 apparently represented excess costs allegedly incurred due to general moisture conditions encountered in "borrow pits 1–A and 1–B" (R. 44).

On March 15, 1941, the contracting officer, who was the Chief Engineer of the Reclamation Bureau at Denver, Colorado (R. 14, 22, 31), entered findings of fact and recommended denial of the claims *in toto* (R. 13, 22–23).

In connection with the claim for $23,615.70 based on the additional borrow pits, the contracting officer found that there was no misrepresentation in the specifications since it was conceded that "all rhyolite was encountered below the depths of the borrow-area test pits shown on the drawings" and "borrow pit conditions are not defined in the specifications" (R. 26). He also found that the presence of rhyolite "cannot be considered as an unusual condition" because it was shown in the log of test pits of the dam foundations, and the contractor might have assumed from this that such a formation extended at various depths beyond the limits of the dam's foundation (R. 27). As to the portions of the borrow pit claim which were based upon drainage and the "general borrow pit conditions" (see note 2, *supra*), the contracting officer found (R. 44):

> The specifications do not describe or define underground or moisture conditions in borrow pits, or climatic, or precipitation conditions at the site of the work. The logs of test pits attached to the specifications show the depths at which ground water was encountered in the borrow areas. Para-

> graph 27 of the specifications places the responsibility for any deductions and conclusions as to the nature of the materials to be excavated and the difficulties of making and maintaining the required excavations upon the contractor.

Disallowance of the claim was accordingly recommended on the grounds (1) that subsurface conditions did not differ materially from those shown on the drawings or indicated in the specifications (R. 25, 36), (2) that paragraph 47 of the specifications (see pp. 6–8, *supra*) expressly authorized the Government engineer to locate additional borrow pits whenever necessary to obtain borrow material for the embankment and bankfill, and (3) that the contract contained no provision authorizing extra payment for the work in question (R. 36–37).[3]

On March 21, 1941, petitioner appealed from this decision to the Secretary of the Interior, who referred the matter back to the contracting officer (R. 23). After obtaining the comments of the two principal Government engineers on the project concerning the statements submitted by

[3] Of the remaining $74,442 in claim, $4,442 was asked for changed subsurface conditions "encountered at the north abutment of the dam" (R. 23, 32) and $70,000 was claimed as damage resulting from the Government's alleged misrepresentation as to the length of the working season (R. 23, 32–33). Both items were denied by the contracting officer (R. 26, 35–36). Neither of these items is involved in the case at bar.

petitioner on the appeal, the contracting officer rendered a report to the Secretary on September 5, 1941, reconsidering the matter (R. 22–24, 30). The report dealt at length with the claim for $23,615.70, allegedly due for the borrow pit work (R. 24–31), and held that while the Government's senior engineer had "definitely assured" prospective bidders that "borrow pit No. 1" would furnish all needed borrow material, his "opinions or expectations * * * cannot be deemed representations amounting to a warranty" (R. 24–25). The report then declared that "the geological data supplied by the Government were true and accurate" and reaffirmed his original finding that the subsurface conditions encountered were not materially different from those shown on the drawings or indicated in the specifications (R. 25). Continuing, the report recognized that the contract (paragraph 27) placed the responsibility for deductions drawn from the geological data upon the contractor and reserved to the Government the right to locate additional borrow pits (paragraph 47), and that in borrow pit excavation the occurrence of unsatisfactory and unexpected materials was common and was generally at the risk of the contractor (R. 29, 30).

However, the report concluded that an adjustment was warranted in this case, in the light of "its own peculiar facts," under the clause of Article 4 referring to "unknown conditions of an

unusual nature," for the reason that "there existed such certainty (based on the geological data obtained) in the minds of both the contracting parties" that borrow pit No. 1 would yield the necessary materials (R. 30). The report accordingly recommended payment as requested (see n. 2, *supra*), of the items comprising the claim of $23,615.70 for additional borrow pit costs.

Thereafter, on December 1, 1941, the Acting Secretary of the Interior entered findings of fact allowing the contractor's appeal to the extent of $23,615.70, for increased costs incurred in the borrow pit operations (R. 12–19). The allowance was made under the same clause of Article 4 invoked in the contracting officer's supplementary report, but upon a somewhat different rationale (R. 18–19):

> It is not clear that the conditions encountered by the contractor in the borrow pit operations were "conditions at the site materially differing from those shown on the drawings or indicated in the specifications," within the meaning of article 4 of the contract. The question remains, however, whether they constituted "unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications," within the meaning of the same article. * * *

> While the occurrence of the rhyolite in itself clearly was an unknown condition, this fact need not be controlling. Rather, the significant fact is that after its discovery there was a determination that, by reason of its presence, the borrow materials would be unusable. In the circumstances, including the various preliminary tests made as to the borrow materials and the materials likely to be found in the general area, and the opinion of those qualified to judge the suitability of the borrow area, this subsequent determination must be regarded as unusual. I therefore find that, within the meaning of article 4 of the contract, the contractor encountered unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications.

No mention was made in the Acting Secretary's findings of the pertinency of Paragraphs 27, 33, 37, and 47 of the specifications (see pp. 5–8, *supra*).

The Bureau of Reclamation thereafter sent the claim to the Comptroller General for settlement in the amount of $23,615.70 (R. 31–32). In a letter of March 23, 1942, to the Secretary of the Interior, extensively analyzing the contract and the history of the claim, the Comptroller General questioned the Government's liability to pay the claim and requested that the Department recon-

sider the matter (R. 31–46). The Comptroller General took the position that the claim in question was governed not by Article 4 of the contract, but rather by the specific provisions of paragraph 47 of the specifications, which contemplated that unknown and unsuitable materials might be discovered in the borrow pits (R. 42–43). More particularly, the Comptroller General's letter challenged on the following grounds the Government's liability for the particular items comprising the borrow pit claim:

(*a*) The item of $5,881 for "clearing and grubbing areas not originally designated as borrow pits," on the ground that paragraphs 47 and 37 of the specifications plainly required the cost of clearing to be included in the unit prices bid for the work and expressly denied any additional allowance therefor to the contractor (R. 43);

(*b*) The item of $3,435.65 for "constructing roads to additional borrow pits," on the grounds that paragraph 33 of the specifications expressly negatived any payment for work done in "constructing * * * any road * * * for use in the performance of the work under these specifications," and that paragraph 47 declared that the unit prices bid for borrow pit excavation "and transportation to embankment * * * shall include the entire cost of the excavation * * * and * * * transportation of the materials to the dam embankment" (R. 43–44);

(*c*) The items of $2,731.05 for "providing drainage for borrow pits" and of $11,568 for the general moisture conditions encountered therein, on the grounds that paragraph 47 made no provision for payment on this account and that there was no basis for reimbursement under Article 4, because the contracting officer had expressly found, on September 15, 1941, that such conditions were not changed conditions within the meaning of Article 4 of the contract, and there was no specific contrary finding by the Acting Secretary that the expense in question was due to conditions differing from those indicated in the drawings or specification or to "unknown conditions of an unusual nature" etc., as requred by Article 4 (R. 45).

In a letter to the Comptroller General dated June 27, 1942, the Acting Secretary of the Interior reaffirmed his prior view that the claim should be paid (R. 9–12), arguing that Article 4 and paragraph 47, when read together, meant "that the Government may designate the location of such borrow pits as may be required," but that once a pit was located the contractor was entitled to use it to an extent "reasonably contemplated by both parties," and to extra compensation if a later move was necessitated because of "conditions within the meaning of Article 4" (R. 11).

Subsequently the Comptroller General sent petitioner a "settlement certificate" denying the claim on the grounds indicated in his letter of March

23, 1942, to the Secretary of the Interior (R. 46–51). On August 25, 1942, petitioner brought suit for a mandatory injunction in the District Court of the United States for the District of Columbia (R. 1–9). Respondent answered (R. 19–51) and moved for summary judgment (R. 51). On November 4, 1942, the court granted the motion and entered judgment for respondent, holding that respondent's action was "discretionary, not ministerial" and within the scope of his authority, that petitioner's right under the contract was "doubtful" and that petitioner had a "proper remedy in the Court of Claims" (R. 52). On appeal, the United States Court of Appeals for the District of Columbia affirmed (R. 55–58), holding that respondent had questioned the decision of the Acting Secretary on an issue of law and that there was enough doubt as to the extent to which respondent was concluded by the departmental rulings on a legal issue, by virtue of Article 15 of the contract, that it "ought not to be decided in a summary action" (R. 58).

## ARGUMENT

Petitioner's argument in substance is this: Article 15 of its contract, with exceptions which are immaterial here, committed the decision of "all * * * disputes concerning questions arising under this contract" to the contracting officer subject to appeal to the head of the depart-

ment; prior decisions of this Court have recognized the effectiveness of such stipulations both as to disputes involving questions of fact and questions of law; accordingly once the Acting Secretary had approved petitioner's claim, respondent's sole authority was to certify it for payment, notwithstanding Section 305 of the Budget and Accounting Act of 1921 (31 U. S. C. § 71) which provides for the settlement and adjustment by respondent's office of "all claims and demands whatever by the Government of the United States or against it."

We express no opinion here as to the ultimate propriety of respondent's reversal of the Acting Secretary's disposition of petitioner's claim or as to the ultimate correctness of his construction of the contract, for none is necessary. The scope of the inquiry in this case is only to determine whether upon the Acting Secretary's submission of the claim for settlement respondent became subject to a duty to certify it for payment "so plainly prescribed as to be free from doubt and equivalent to a positive command" and therefore "so far ministerial that its performance may be compelled by mandamus." *Miguel* v. *McCarl,* 291 U. S. 442, 454, quoting *Wilbur* v. *United States,* 281 U. S. 206, 218–219. As both lower courts correctly held, petitioner did not establish the existence of so clear a duty in this case.

1. While it is true that the decisions of this Court recognize the effectiveness of contractual

stipulations providing for the finality of departmental decisions, the rule of finality is qualified and not sufficiently absolute to turn respondent's powers of settlement under the 1921 Act into a merely ministerial function upon receipt of petitioner's claim.[4] Thus the departmental decision does not control if it is so grossly erroneous as to impute fraud or bad faith (see *Ripley* v. *United States,* 223 U. S. 695, 704), or if it is manifestly contrary to the provisions of the contract (*Smith* v. *United States,* 256 U. S. 12, 16–17; *Penker Construction Company* v. *United States,* 96 C. Cls. 1, 39, 41; *Arundel Corporation* v. *United States,* 96 C. Cls. 77, 79–80, 113–115; cf. *De Groot* v. *United States,* 5 Wall. 419), or if it is without any supporting evidence or finding (*Smith* v. *United States, supra,* at 15–16; *B–W Construction Company* v. *United States,* No. 43925, C. Cls., decided October 5, 1942, slipsheet pp. 21–22, 27; *Ira J. Lyons* v. *United States,* No. 45215, C. Cls., decided March 1, 1943; cf. *United States* v. *Ross,* 92 U. S. 281; *United States* v. *Clark,* 94 U. S. 73; 96 U. S. 37). The latter two qualifications were the very grounds assigned by respondent for his refusal to accept the departmental decision in the case at bar (see pp. 15–16, *supra*). Respondent's decision was thus in an area " 'involving the character of judgment or discretion,' the exercise of which will not be compelled by mandamus." *United States ex*

[4] "The mandatory injunction herein prayed for is in effect equivalent to a writ of mandamus, and governed by like considerations." *Miguel* v. *McCarl,* 291 U. S. 442, 452.

*rel. Giraud Co.* v. *Helvering,* 301 U. S. 540, 543. And, of course, the remedy sought being extraordinary, "whether he decided right or wrong, is not the question." *Riverside Oil Co.* v. *Hitchcock,* 190 U. S. 316, 324.[5]

2. Petitioner points to no statute creating the asserted ministerial duty in terms "so clear and precise" as to require no construction (cf. *Miguel* v. *McCarl,* 291 U. S. 442, 453, 454).[6] Instead, petitioner seeks to establish the ministerial nature of respondent's function in this case in reliance upon Article 15 of the contract and decisions of this Court, all on the merits, in cases involving the rights of parties under similar contractual provisions. But this Court long ago resisted an attempt to construct mandamus upon a framework of this character, and indeed a stronger one than petitioner shows here. In *United States* v. *Lynch,* 137 U. S. 280, an attempt was likewise

[5] Assuming *arguendo* that respondent's decision was erroneous, it was clearly not arbitrary. Compare *MacArthur Bros. Co.* v. *United States,* 258 U. S. 6; *Alex Ranieri* v. *United States,* 96 C. Cls. 494, certiorari denied, 317 U. S. 690, rehearing denied, 317 U. S. 713—both relied on by respondent in making his decision (R. 45, 49, 51); see also *Adams* v. *Nagle,* 303 U. S. 532, 542–543.

[6] Indeed, standing alone the basic legislation detailing the functions of the General Accounting Office, particularly Sections 304 and 305 of the Budget and Accounting Act of 1921 (set out, *infra,* p. 27), would indicate the contrary. Cf. *Lambert Lumber Co.* v. *Jones Engineering & Construction Co.,* 47 F. (2d) 74, 80–82, 85 (C. C. A. 8), certiorari denied, 283 U. S. 842. See *Globe Indemnity Co.* v. *United States,* 291 U. S. 476, 480.

made to enforce a claim against the United States by mandamus against its fiscal officers, and it was urged in support of the writ that previous expressions of this Court established the merits of the claim. This Court, however, denied the writ, holding that its previous decisions would establish at best only an erroneous determination by the fiscal officer and not his lack of authority to pass upon the claim. Significantly, the Court disposed of the case without finding it necessary to inquire into the validity of the petitioner's contention that the Court's prior construction of the very statute upon which his claim rested established the merits of the claim beyond dispute. Sound considerations of policy support the Court's approach in the *Lynch* case, at least as a general proposition. The disposition of claims against the Government *via* extraordinary process should hardly be rested upon the nice questions concerning the precise meaning of judicial opinions which would inevitably arise were mandamus made generally available upon the basis urged here. Compare *Brashear* v. *Mason,* 6 How. 92, 102.

In any event, the *Lynch* case should be followed here. As the court below held (R. 58), the controversy between respondent and the Acting Secretary as to whether petitioner's claim was governed by Article 4 or specification 47 involves a question of law. Relying primarily on *United States* v. *Mason & Hangar Co.,* 260 U. S. 323, affirmed 261 U. S. 610, and *United States* v. *John*

*McShain, Inc.*, 308 U. S. 512–513, 520, petitioner maintains that even as to such questions, respondent was so plainly concluded by the Acting Secretary's decision by virtue of Article 15 of the contract that his sole function was to perform the ministerial duty of certifying payment. Even if this be their sound ultimate import, certainly neither of these decisions, nor any of the others cited by petitioner, purports to define so completely the scope of the finality of departmental decisions on questions of law, under such a clause as Article 15, as to exclude a decision by respondent involving the " 'character of judgment or discretion,' the exercise of which will not be compelled by mandamus" (see p. 19, *supra*).

Moreover, none of the decisions relied on by petitioner decided that, as a matter of interpretation, Article 15 of the present contract was intended to require finality of departmental decision on every question of law arising under the contract.[7] Contrast *United States* v. *Babcock*, 250

[7] In *United States* v. *John McShain, Inc.*, *supra*, the only decision of this Court in any way involving the instant Article 15, the Government argued at p. 10 of its brief that under Article 15 the departmental interpretation of plans and drawings was final, but the Government also relied on Section 25 of the specifications which so provided specifically. Thus the Court was not required to construe Article 15 at all, and its reliance in the *per curiam* decision on cases not involving Article 15 may indicate that it was not construing Article 15 but instead was upholding the validity of the unambiguous, specific finality provision of Section 25.

U. S. 328, 331. Quite recently the Court of Claims has said of an identical Article 15 in another contract that: "We think that disputes, as to which the contracting officers' decision is final and conclusive, should be narrowly limited" (*Penker Construction Company* v. *United States,* 96 C. Cls. 1, 37), and has construed the provision to require finality of departmental decision as to what work the contract requires to be done, but not as to what sum shall be paid for it (*ibid.,* p. 38–39). And in another case that court questioned the competency of the parties to a Government contract to stipulate at all for the decision by the contracting officer of all disputes involving questions of law. See *Callahan Construction Company* v. *United States,* 91 C. Cls. 538, 616. See also *Arthur W. Langevin* v. *United States,* No. 43903, C. Cls., decided May 3, 1943, slipsheet pp. 13–14; *English Construction Co.* v. *United States,* 29 F. Supp. 526, 527, 531 (Del.). As the court below concluded (R. 58), such expressions demonstrate the existence of sufficient "room for difference of opinion" concerning the meaning of Article 15 to defeat petitioner's right to the relief it seeks. Cf. *Ness* v. *Fisher,* 223 U. S. 683, 691; *United States ex rel. Chicago Great Western Railroad Co.* v. *Interstate Commerce Commission,* 294 U. S. 50, 54.[8]

[8] It is not necessary for present purposes to endorse the soundness of such expressions. It is sufficient that they indicate that the principles urged by petitioner have not been so

3. The Court of Claims is concededly open to petitioner. And while this may not always make mandamus inappropriate (cf. *Miguel* v. *McCarl*, 291 U. S. 442, 455), in the circumstances of this case to try petitioner's right to payment here "is to make the writ of mandamus serve the purpose of an ordinary suit and to depart from the settled rule that the writ of mandamus may not be employed to secure the adjudication of a disputed right for which an ordinary suit affords a remedy equally adequate, and complete." *United States ex rel. Girard Co.* v. *Helvering*, 301 U. S. 540, 544.[9]

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unequivocally established as to expose respondent to summary process.

The circumspection with which this Court itself has handled the question of departmental finality on questions of law is illustrated by the most recent case in which it had occasion to consider the question—*United States* v. *Callahan Walker Construction Co.*, 317 U. S. 56 (not the same as the *Callahan Construction Co.* case, cited to the text, *supra*). On appeal from a judgment of the Court of Claims reversing a decision by the contracting officers, the Government urged that it was immaterial whether the dispute in question involved factual issues or, as the lower court held, legal issues, since the dispute in question was such that the contracting officer's decision was conclusive under the contract in either case. See Brief for the United States in No. 65, this Term, pp. 31–34. However, while reversing the Court of Claims, this Court inquired as to the precise nature of the dispute, held that it was factual, and refrained from commenting upon the Government's argument that the departmental decision was equally conclusive whether the dispute was factual or legal.

[9] There is no merit in petitioner's contention that it has no other adequate remedy. While admitting it can resort to

In any event, since mandamus issues only in the Court's discretion, there being no unqualified right to the writ even to compel the performance of a ministerial duty (*Redfield* v. *Windom,* 137 U. S. 636, 644–645; *Duncan Townsite Co.* v. *Lane,* 245 U. S. 308, 311–312; *In re Cohen,* 107 F. (2d) 881, 883 (C. C. A. 5)), the court's self-imposed restraint against judicial "interference * * * with the performance of the ordinary duties of the executive departments of the government" (*Decatur* v. *Paulding,* 14 Pet. 496, 516; *Perkins* v. *Lukens Steel Co.,* 310 U. S. 113, 131, 132) is peculiarly apropos in a case where the petitioner has another adequate remedy.

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the Court of Claims, petitioner urges the inadequacy of a proceeding in that forum on grounds of delay and expense. But if such considerations of convenience can suffice to establish the unavailability of other remedies, little remains of the basic principle that extraordinary process will be denied if relief can be otherwise secured. Cf. *Ex parte Perry,* 102 U. S. 183, 186; *United States* v. *Lynch,* 137 U. S. 280, 287. Nor is there any merit in the suggestion that if the writ is not issued and petitioner obtains a judgment in the Court of Claims, respondent may then decline to certify the judgment to Congress for appropriation (Pet. 9). Should the Comptroller General decline to pay any such judgment from an available appropriation (31 U. S. C. 225), it would be the function of the Secretary of the Treasury to certify the judgment to Congress for appropriation (31 U. S. C. 226). In any event, mandamus does not issue "in anticipation of an omission of duty." Ex *parte Cutting,* 94 U. S. 14, 20; cf. *Miguel* v. *McCarl, supra,* at p. 456.

CONCLUSION

There is no conflict and the decision of the court below is clearly correct. The petition for a writ of certiorari should accordingly be denied.

Respectfully submitted.

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